

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRON LAMAR HEREFORD,

Defendant-Appellant.

UNPUBLISHED

January 28, 2003

No. 227296

Oakland Circuit Court

LC No. 99-166249-FC

ON REHEARING

Before: O’Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced to a term of 9 to 20 years’ imprisonment. He appeals as of right. We affirm.

Defendant and two codefendants, Alvin Smith and Kyle Davis, were charged with the April 22, 1999, armed robbery of a Hungry Howie’s restaurant in Southfield. Codefendant Smith stood trial separately and was convicted of armed robbery. Defendant and codefendant Davis stood trial together, with a jury determining Davis’ guilt and the circuit court determining defendant’s guilt.

I

Defendant first challenges the circuit court’s findings that he participated in the armed robbery and that he possessed a gun during the robbery. To the extent defendant suggests that insufficient evidence supported the circuit court’s findings, we review all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable factfinder could determine defendant’s guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Questions regarding witness credibility must be resolved by the factfinder, and this Court should not interfere with the factfinder’s role in determining witness credibility or the weight of evidence. *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002).

In considering defendant’s related claim that the circuit court clearly erred in finding that he participated in and held a gun during the robbery, this Court reviews the entire record to determine whether it possesses the definite and firm conviction that the circuit court made a

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

mistake. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). An appellate court will defer to the circuit court's resolution of factual issues, especially where it involves the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

Defendant's claim that the evidence at trial did not support the circuit court's identification of him as a participant in the robbery lacks merit. The assistant manager of the restaurant testified extensively regarding his recollections of the armed robbery. Both the assistant manager and the restaurant's part owner recalled that the assistant manager had worked with defendant for at least a month, on several occasions each week. The assistant manager testified repeatedly and with certainty that he recognized defendant as one of the robbers when defendant's mask briefly slipped from his face. A police officer who responded to the restaurant after the robbery testified that the assistant manager positively identified defendant as a participant in the robbery. Codefendant Smith also offered testimony that defendant participated in the robbery.

This evidence amply supports the circuit court's finding that defendant participated in the robbery. *Nowack, supra*. While defendant questions the assistant manager's ability to have discerned his identity during the robbery, this Court will not interfere with the circuit court's assignment of significant weight to the assistant manager's unwavering identification testimony. *Elkhoja, supra*. Likewise, we will not second guess the circuit court's explicit determinations to credit the testimony indicating that defendant participated in the crime and to disbelieve defendant's testimony regarding his whereabouts. *Id.* In response to defendant's claim that some evidence suggested that a person other than defendant might have participated in the crime, we note that "the prosecutor need not negate every reasonable theory consistent with innocence" *Nowack, supra* at 400.¹

We similarly conclude that, after reviewing the entire record, including the aforementioned evidence of identification credited by the circuit court, we do not possess the definite and firm conviction that the circuit court erred in finding that defendant participated in the robbery. *Cartwright, supra*; *Swirles (After Remand), supra*.

Regarding defendant's challenge to the circuit court's finding that defendant possessed a gun during the robbery, codefendant Smith's testimony to this effect constituted the sole evidence of record supporting the court's finding. Smith's testimony directly contradicted the assistant manager's recollection that defendant did not have the gun during the robbery. Although Smith never testified that anyone other than defendant had the gun during the robbery, Smith's account of the crime otherwise appeared vague and somewhat inconsistent with the victims' recollections.² Nonetheless, the circuit court apparently believed at least that portion of

¹ Regarding defendant's repeated references in his briefs on appeal to a police evidence analysis that detected no gunpowder on defendant's hands, we decline to consider the analysis because defendant did not introduce this exhibit during trial. See *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998) (noting that this Court generally will not permit enlargement of the record on appeal), rev'd in part on other grounds 462 Mich 415 (2000).

² Defendant has not properly preserved for our review his assertion that the prosecutor improperly utilized leading questions to elicit Smith's testimony, because defendant failed to
(continued...)

Smith's testimony recounting defendant's possession of a weapon, and we reiterate that "[t]his Court should not interfere with the [factfinder's] role in determining the weight of the evidence or the credibility of witnesses." *Elkhoja, supra*.

Accordingly, we find that sufficient evidence existed to support the circuit court's determination that defendant possessed a weapon during the robbery. Furthermore, because evidence supports the circuit court's finding that defendant possessed a weapon and the court found this testimony credible, we cannot conclude that the court clearly erred in making this finding. *Cartwright, supra*; *Swirles (After Remand), supra*.³ Moreover, even disregarding Smith's testimony that defendant had a weapon, the substantial identification testimony discussed above amply supported defendant's conviction as an aider and abettor of the armed robbery. MCL 767.39; see also *People v Acosta*, 153 Mich App 504, 512; 396 NW2d 463 (1986).⁴

(...continued)

raise this issue in his appellate brief's statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, the circuit court did not abuse its discretion in permitting the prosecutor to employ leading questions because (1) Smith was "identified with an adverse party" and no indication existed that Smith had received consideration for his testimony against defendant, MRE 611(c)(3); and (2) Smith possessed diminished mental capacity. MRE 611(a); see e.g., *People v Wheeler*, 186 Mich 489, 492-493; 152 NW 968 (1915); *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

³ In a related contention, defendant suggests that the circuit court, which had presided over codefendant Smith's earlier trial, erred in relying on its knowledge regarding the evidence introduced at Smith's trial in finding that defendant had a gun during the robbery. We find that defendant's contention lacks merit. Smith testified at defendant's trial that defendant had a gun during the robbery, the circuit court cited and relied on Smith's testimony at the instant trial, and the court's finding that defendant had a weapon cannot be characterized as clearly erroneous. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997); *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996).

⁴ Defendant failed to preserve for appellate review his argument, raised for the first time on appeal, that Smith lacked the capacity to testify pursuant to MRE 601. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Defendant also failed to present any evidence rebutting the presumption that Smith, whose testimony reflected his ability to distinguish the truth from a lie, was competent to testify. See *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

Regarding defendant's suggestion that the circuit court should have discounted Smith's testimony on the basis of Smith's status as an accomplice to the robbery, defendant failed to properly present this claim within his appellate brief's statement of questions presented. *Brown, supra*. Furthermore, the record reflects the circuit court's awareness of Smith's accomplice status, Smith's denials that he received any promises of leniency, and Smith's own imminent sentencing hearing. *People v Reed*, 453 Mich 685, 691-692; 556 NW2d 858 (1996). Moreover, in light of the other identification testimony supporting defendant's conviction as an aider and abettor of the robbery, any error with respect to the admission of Smith's accomplice testimony qualifies as harmless. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

II

Defendant also raises many and varied allegations that his defense counsel rendered ineffective assistance. Because defendant failed to properly preserve this issue for appellate review by timely moving for a new trial or evidentiary hearing on the basis of ineffective assistance, our review of defendant's allegations is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Rodgers, supra* at 714-715.

Limiting our review to the existing record, we are not persuaded that defense counsel was ineffective. Defendant has failed to overcome the strong presumption that defense counsel's evidentiary decisions and witness examinations constituted sound trial strategy, or to demonstrate that any action by defense counsel deprived him of a substantial defense or otherwise adversely affected the outcome of his trial. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

We note that defense counsel vigorously cross-examined both witnesses who identified defendant, namely the assistant manager and codefendant Smith. We further note that the record, which reflects defendant's knowing and voluntary waiver of his right to a jury trial, contradicts defendant's claim that defense counsel gave him poor advice regarding his decision to opt for a bench trial. See MCR 6.402(B); *People v Reddick*, 187 Mich App 547, 549-550; 468 NW2d 278 (1991). We lastly observe that defense counsel did not provide ineffective assistance by failing to make a meritless motion to suppress defendant's precustodial statements to the police. See *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III

Defendant next argues that the circuit court erred in calculating the sentencing guidelines range by assigning fifty points to offense variable seven (OV 7). This Court reviews for an abuse of discretion a sentencing court's offense variable scoring, provided that some evidence exists to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

We find that the circuit court properly scored fifty points for OV 7 (aggravated physical abuse) on the basis that the victims of the robbery were "treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). At the time of defendant's 1999 offense, terrorism

was defined as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.”⁵ MCL 777.37(2). The instant record contains evidence that defendant had a gun during the robbery, that the gun was pointed at both victims during the robbery, that a robber used the gun to strike one victim on the back of his head, that the victims feared for their lives, and that the robbers fired the gun during the robbery. Under these circumstances, we cannot characterize the circuit court’s scoring of OV 7 as an abuse of discretion. *Hornsby, supra* at 468-469.

IV.

Finally, defendant claims in his supplemental brief on appeal that his right to cross-examine a witness was diminished because the trial court held a bench conference without defense counsel being present. Defendant asserts that if his counsel was present he would have gained valuable information that would have allowed him to impeach witness and codefendant Smith’s credibility.

We agree with defendant that it was improper to conduct a bench conference without defense counsel’s presence. See generally *People v Riggs*, 223 Mich App 662, 677; 568 NW2d 101 (1997) (Sixth Amendment right to counsel attaches at “critical stage” of proceedings); *People v Gonzalez*, 197 Mich App 385, 402; 496 NW2d 312 (1992) (improper ex parte communications deny right to fair trial). However, we conclude that the error was harmless beyond a reasonable doubt. See *People v Watson*, 245 Mich App 572, 585; 629 NW2d 411 (2001) (violation of right of confrontation may not be redressed unless error is harmless beyond a reasonable doubt). As we have previously stated, disregarding Smith’s entire testimony, the balance of the trial testimony supports defendant’s conviction for aiding and abetting an armed robbery. *Id.* Further, the court, sitting as the trier of fact, was well aware of the problems with Smith’s testimony, and knew from the bench conference that Smith had, in fact, spoken with the detective.

Affirmed.

/s/ Peter D. O’Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie

⁵ We note that this statute was amended in 2002 to remove the “terrorism” language. See 137 PA 2002.